[Cite as *State v. Tharp*, 2016-Ohio-8316.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104216

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HARRY THARP, JR.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-598816-A

BEFORE: Blackmon, J., Jones, A.J., and Kilbane, J.

RELEASED AND JOURNALIZED: December 22, 2016

ATTORNEY FOR APPELLANT

Cheryl A. Haynes
1689 Eddington Road, Suite 4
Cleveland Hts., Ohio 44118

Harry Tharp, Jr.
Inmate No. A681-335
Grafton Correctional Institution
2500 S. Avon-Beldon Road
Grafton, Ohio 44044

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor

John Farley Hirschauer
Assistant County Prosecutor
Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

PATRICIA ANN BLACKMON, J.:

{¶1} Harry Tharp, Jr. ("Tharp") pled guilty to two counts of corrupting another with drugs, a second-degree felony, and two counts of importuning, a fifth-degree felony. Subsequently, the court sentenced Tharp to four years in prison for each corrupting another with drugs count, to run consecutively, and one year in prison for each importuning count, to run concurrently, for an aggregate sentence of eight years in prison.

{¶2} On appeal, Tharp's appointed counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and requested leave to withdraw as counsel.

{¶3} In *Anders*, the United States Supreme Court held that if appointed counsel, after a conscientious examination of the case, determines the appeal to be wholly frivolous, he or she should advise the court of that fact and request permission to withdraw. *Id.* at 744. This request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.* Further, counsel must also furnish the client with a copy of the brief, and allow the client sufficient time to file his or her own brief. *Id.* In the case at hand, appointed counsel fully complied with the requirements of *Anders*.

{¶4} Once the defendant's counsel satisfies these requirements, this court must fully examine the proceedings below to determine if any arguably meritorious issues exist. If we also determine that the appeal is wholly frivolous, we may grant counsel's

request to withdraw and dismiss the appeal without violating constitutional requirements, or may proceed to a decision on the merits if state law so requires. *Id.*

{¶5} On May 12, 2016, this court ordered appointed counsel's motion to withdraw to be held in abeyance pending our independent review of the case. We further notified Tharp that he had until July 1, 2016, to file his own appellate brief, but Tharp failed to do so. Rather, on July 12, 2016, Tharp filed a pro se motion for extension of time in which to file a merit brief and a pro se motion to substitute counsel.

{¶6} This court has held that "we do not believe that a defendant is entitled to the immediate withdrawal of counsel and appointment of new counsel on the mere assertion that an appeal would be frivolous. Criminal defendants are entitled only to competent counsel, not the counsel of their choice." *State v. Taylor*, 8th Dist. Cuyahoga No. 101368, 2015-Ohio-420, ¶ 11. Additionally, criminal defendants do not have a right to hybrid representation. *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, ¶ 32 ("a criminal defendant has the right to representation by counsel or to proceed pro se with the assistance of standby counsel. However, these two rights are independent of each other and may not be asserted simultaneously.") Criminal defendants have "the right either to appear pro se or to have counsel," and there is no right to act as co-counsel on your own behalf. *State v. Thompson*, 33 Ohio St.3d 1, 6-7, 514 N.E.2d 407 (1987).

{¶7} Accordingly, we denied Tharp's pro se motion for new counsel, but granted his extension of time to file a merit brief, given his current counsel's opinion that an appeal would be frivolous. On October 20, 2016, Tharp filed his pro se merit brief, and

on October 21, 2016, Tharp filed a supplemental merit brief. Thus, we review this appeal pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), by conducting an independent examination of the record in light of "the issues or points raised by either the *Anders* brief or the pro se brief." *State v. Taylor*, 8th Dist. Cuyahoga No. 101368, 2015-Ohio-420, ¶ 20. *See also* Loc.App.R. 16(C).

{¶8} Tharp's appointed counsel states in her *Anders* brief that she has "carefully reviewed the trial record, and examined the relevant case and statutory law, and does not believe that the trial court committed any errors which prejudiced [Tharp] and which merit review by this Court." Counsel did, however, set forth the following "possible errors":

I. The Court erred by imposing prison terms for the second and fifth degree felonies.

II. The Court erred when it imposed multiple prison terms and ran them consecutively.

{¶9} Additionally, Tharp, acting pro se, raises the following potential errors for our review:

I. The trial court erred as a matter of law by failing to make a determination as to whether the multiple counts in this case were allied offenses of similar import and thus, under the Double Jeopardy Clause, required merger for sentencing.

II. Appellant was deprived of the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments where counsel failed to raise any objection to the failure of the trial court to make a determination as to whether the multiple counts in this case required merger under the Double Jeopardy Clause.

III. The trial court committed plain error in imposing individual sentence [sic] for counts that constitute allied offenses of similar import.

IV. The trial court erred or abused it's [sic] discretion because consecutive sentence is [sic] disproportionate to the seriousness of appellant's conduct with regard to corrupting another with drugs and importuning.

{¶10} We note that counsel's second potential error and Tharp's fourth potential error are indistinguishable and will be addressed together. Additionally, Tharp's first and third potential errors will be addressed together. After conducting an independent review of the record, we find that there are no issues of arguable merit to present on appeal. Accordingly we grant appointed counsel's motion to withdraw, overrule Tharp's pro se potential errors, and affirm the trial court's judgment.

{¶11} Tharp was indicted with ten felony counts for supplying his 15-year-old daughter and her 15-year-old friend with alcohol, cocaine, and crack cocaine, then attempting to solicit sex from them. Tharp pled guilty to the four counts detailed above, and the remaining counts were dismissed. The court sentenced him to eight years in prison.

Guilty Plea

{¶12} We first note that Tharp's "guilty plea waived any complaint as to claims of constitutional violations not related to the entry of the guilty plea." *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 104. Additionally, a criminal defendant has a right to appeal his or her sentence. *See, e.g., State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923.

{¶13} Tharp entered a plea that was made knowingly, intelligently, and voluntarily. The trial court followed the dictates of Crim.R. 11(C)(2) in accepting the plea. This provision provides that the court must address defendants personally and (1) determine that they understand the nature of the charges against them and of the maximum penalty involved, (2) inform them of and determine that they understand the effect of a guilty or no contest plea and that the court may proceed with judgment and sentence, and (3) inform them of and determine that they understand the constitutional rights that they are giving up by entering into their plea. Crim.R. 11(C)(2)(a)-(c). Additionally, the trial court also substantially complied with explaining to Tharp the nonconstitutional rights he was waiving.

Felony Sentencing

{¶14} R.C. 2953.08(G)(2) provides, in part, that when reviewing felony sentences, the appellate court's standard of review is not whether the sentencing court abused its discretion; rather, if this court "clearly and convincingly" finds that (1) "the record does not support the sentencing court's findings under" R.C. Chapter 2929 or that (2) "the sentence is otherwise contrary to law," then we may conclude that the court erred in sentencing. *See also State v. Marcum*, Slip Opinion No. 2016-Ohio-1002.

{¶15} Upon review, we find no issues of arguable merit in the prison sentence imposed by the trial court. Tharp pled guilty to two counts of importuning, in violation of R.C. 2907.07(B)(1), which is a fifth-degree felony. Pursuant to R.C. 2907.07(F)(3), 2929.13(F)(4), and 2929.14(A)(5), there is a presumption of a prison term of between six

and 12 months for an importuning conviction. Tharp also pled guilty to two counts of corrupting another with drugs, in violation of R.C. 2925.02(A)(2), which is a second-degree felony, with a mandatory prison term between two and eight years. *See* R.C. 2925.02(C)(1)(a) and 2929.14(A)(2).

{¶16} Tharp's corrupting another with drugs convictions require the court to impose a prison term as part of his sentence. Tharp's importuning convictions carry a presumption of prison and our review of the sentencing hearing transcript show that Tharp presented no evidence to rebut this presumption. Therefore, it would be frivolous to argue that the trial court erred when it sentenced Tharp to prison.

Consecutive Sentences

{¶17} The Ohio Supreme Court has held that "to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry * * *." *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37. Pursuant to R.C. 2929.14(C)(4), the court must find consecutive sentences are "necessary to protect the public from future crime or to punish the offender"; "not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public;" and at least one of the following three factors:

> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction * * *, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the

> multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶18} In the case at hand, both victims' mothers testified that they have known Tharp for approximately 30 years, and he has a pattern of manipulating and exploiting vulnerable girls and women. One of the mothers stated,

> For a lifetime, [Tharp] has been preying on the blindly obedient and vulnerable, providing drugs and gifts, influencing, seducing, controlling, emotionally using anyone that fit that description. Harry Tharp is a master manipulator who will hurt you, then help you. Blame you, then forgive you. Scream at you, then console you. Build you up and break you down, only to build you up again. To have any relationship with Harry Tharp is to be a victim. He's a coward who takes advantage of anyone whose defenses are down, anyone with soft boundaries.

{¶19} Evidence in the record shows that Tharp's criminal history dates back to 1983. He has a history of substance abuse and addiction. He has served time in prison for involuntary manslaughter. In 2011, he was convicted of felony burglary, and his juvenile son was his codefendant. While he was in jail during the pendency of the instant case, he called one of the victims and attempted to manipulate her testimony. The calls were recorded and played at the sentencing hearing. During Tharp's interviews with law enforcement regarding this case, he consistently blamed his 15-year-old daughter. He also pointed the finger at her in letters he sent to his family while in jail.

{¶20} Tharp testified at his sentencing hearing and, although he stated that he was "truly remorseful," he denied providing his daughter and her friend with drugs. He then explained why his ex-wife, her new husband, Tharp's son, Tharp's daughter, Tharp's daughter's cousin, Tharp's daughter's friend, the friend's mother, step-father and brother, and a man known on Facebook only as "James" were all responsible for the events that took place in the case at hand.

{¶21} The court stated that it considered "the record, the [presentence investigation report, and] any written or oral statements made to the court today as is required by [R.C.] 2929.19(B)(1)." The court considered the purposes and principles of sentencing under R.C. 2929.11, the seriousness and recidivism factors under R.C. 2929.12, and "the need for deterrence, incapacitation, rehabilitation and restitution." Additionally, the court found the following regarding consecutive sentences:

> a consecutive sentence is necessary to protect the public from future crimes or to punish the offender and that a consecutive sentence is not disproportionate to the seriousness of the offender's conduct and to the danger the offender posed to the public, and the court also finds that the multiple offenses that were committed in this case, meaning against [Tharp's daughter] and then against [her friend] were part — that the harm caused by these multiple offenses was so great and so unusual, no single prison term for any offenses committed as part of any of the course of conduct adequately reflect the seriousness of the offender's conduct.
>
> Specifically, I am giving you a consecutive sentence because for each of these young women, I am again very disturbed that the ages of these victims and the fact that you allowed them to do drugs in your home, whether you provided it to them or you didn't and quite frankly, the court believes that you did provide some to them * * *.

{¶22} Upon review, we find that there are no arguable legal issues regarding Tharp's consecutive sentences, and a direct appeal on this matter would be wholly frivolous.

Allied Offenses

{¶23} The proper analysis to determine whether offenses are allied and subject to merger under R.C. 2941.25(B) is as follows:

> A trial court and the reviewing court on appeal * * * must first take into account the conduct of the defendant. In other words, how were the offenses committed? If any of the following is true, the offense cannot merge and the defendant may be convicted and sentenced for multiple offenses: (1) the offenses are dissimilar in import or significance — in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, and (3) the offenses were committed with separate animus or motivation. * * * We therefore hold that two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.

State v. Ruff, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 25-26.

{¶24} Turning to Tharp's conduct in committing the offenses of which he was convicted, we note that he pled guilty and the facts in the record are not fully developed. However, his presentence investigation report summarized the following information from the statements the victims made to the police:

> Between 6/1/2015 and 8/24/2015, the defendant, Harry Tharp, allowed his fifteen year old daughter * * * and her fifteen year old friend * * * to live with him * * * . During that time, the defendant provided and smoked/snorted marijuana, cocaine and crack cocaine on an almost daily

basis with [the victims]. The defendant also solicited sex with the girls on at least three occasions. The victims stated that the defendant never forced them but asked them multiple times.

{¶25} It is undisputed that there were two victims in the case at hand. Therefore, Tharp may be convicted of two counts of corrupting another with drugs and two counts of importuning. Furthermore, Tharp's conduct of furnishing his daughter and her friend with drugs is dissimilar with and distinct from his acts of soliciting the 15-year-old girls to engage in sexual conduct. Additionally, the offenses of which Tharp was convicted resulted in separate, identifiable harm to each victim. Therefore, pursuant to *Ruff* and R.C. 2941.25, these offenses are not allied and may not be merged. Accordingly, there are no arguably meritorious issues concerning allied offenses.

Ineffective Assistance of Counsel

{¶26} To succeed on a claim of ineffective assistance of counsel, a defendant must establish that his or her attorney's performance was deficient and that the defendant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance." *Id.* at 697. *See also State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 3743 (1989).

{¶27} In the case at hand, our independent review of the record shows that Tharp suffered no prejudice as a result of his guilty plea and prison sentence and that his counsel's performance was not ineffective. Accordingly, a direct appeal in the instant case would be wholly frivolous. Tharp's counsel's motion to withdraw is granted, his pro se potential errors are overruled, and his convictions and sentence are affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

LARRY A. JONES, SR., A.J., and
MARY EILEEN KILBANE, J., CONCUR